Supreme Court, U.S.
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No. 80-913

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Petitioner,

vs.

RICHARD L. INGLE,
Respondent.

On Petition For Writ of Certiorari
To The Missouri Court of Appeals, Eastern District

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

(RESTATED)

Whether *Norfolk & Western Railway Company* v. *Liepelt,* 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980), should be applied retroactively, to arbitrarily reverse a non-wrongful death FELA case tried more than two years prior to the decision in *Liepelt,* under the following circumstances: Where the defendant made no attempt whatsoever to introduce any evidence pertaining to plaintiff's injuries, damages or wage loss; where there was no issue in the trial and no actuarial testimony presented by either party pertaining to wage loss calculations; where the defendant-railroad did not even offer an instruction on income taxation prior to submission of the case to the jury; where, in any event, Missouri appellate courts forbade the giving of an income tax instruction; where the record on its facts merely presents the limited inquiry of whether the trial court properly responded to a communication received from a juror during the jury's deliberation; where plaintiff's damages were not really contested by the defendant in the trial; and where the amount of the verdict was clearly not excessive, was fully supported by the evidence, and the defendant-railroad did not even raise the issue of excessiveness of the verdict as a point on appeal.

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No. 80-913

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

Respondent accepts petitioner's statement of the opinions below.

JURISDICTION

Respondent accepts petitioner's statement concerning jurisdiction.

STATEMENT OF THE CASE

Petitioner's statement of the case does not constitute a fair and concise statement of the facts relevant to the issues herein. In order to avoid repetition, additional relevant facts will be set forth under the appropriate point in the argument.

ARGUMENT

I.

Petitioner's Formulation Of The Questions Presented By The Instant Case Is Distorted And Misleading. Contrary To Petitioner's Assertions, The Issues Herein Affect Only A Narrow Class Of Cases. Petitioner Has Grossly Misinterpreted The Opinion Below In Order To Seek Review In This Court.

Petitioner's (hereinafter defendant) statement of the question presented for review distorts and obscures the true nature of the instant case. Contrary to the implications of petitioner's statement of the issues presented for review, the only issue involved herein is a very narrow one. On its facts, the only question actually presented by this record involves the trial court's response to a communication from a juror during deliberation. Further, this case was tried in the Missouri State Courts more than two years prior to the date of the decision in *Liepelt*. It was pending before the Missouri Court of Appeals, Eastern District, on petitioner's Motion for Rehearing following opinion, at the time of the decision in *Liepelt*. These aspects of the procedural posture of the instant case are of utmost importance. This case involves only the question of the application of *Liepelt* to an FELA case tried prior to the date of decision in *Liepelt* and pending on direct appeal on the date of decision in *Liepelt* - and nothing more. There can be no question as to the fact that *Liepelt* applies to each and every FELA case tried after the date of its decision, and that the jury must be instructed on income taxes upon request by the defendant in each such case. Nothing in *Ingle* is in any way inconsistent with that. This case presents absolutely no issue concerning the obvious and self evident necessity of following *Liepelt* in all cases tried after the date of its decision. Conversely, no question is presented in the instant case concerning actions in which all avenues of direct appeal were exhausted prior to the date of the decision in *Liepelt*. Obviously, such verdicts will stand.

In short, the issue presented herein will affect only an extremely limited number of cases - those which were tried prior to *Liepelt* and which were pending on appeal at the time of the decision in *Liepelt*. In all cases tried after *Liepelt*, of course, *Liepelt must* be given application.

Understanding of the narrow nature of the question involved in this case is essential because of the way in which defendant has chosen to state the questions presented. Defendant's formulation of the questions presented is misleading because it implies (and this is especially true of question 2 as presented by defendant), that *Ingle* announces a rationale for refusing to apply *Liepelt* in a case tried after the date of the decision in that case. Such is emphatically not the case. As will be demonstrated below, the *Ingle* court gave consideration to the fact that the damages in this case were fully supported by the evidence and were not excessive only in order to apply the tests laid down by this Court for determining whether a judicial decision should be given prospective or retroactive effect.

In this regard, defendant's discussion of *Flanigan* v. *Burlington Northern, Inc.*, 632 F.2d 880 (8th Cir. 1980), is highly inaccurate. *Flanigan* merely represents a rather routine application of the harmless error rule. In this regard, the *Flanigan* court, relying in part on *Domeracki* v. *Humble Oil & Refining Co.*, 443 F.2d 1245 (3rd Cir. 1971) (cited and relied upon by this Court in *Liepelt),* found that since the railroad was not precluded from offering evidence of net (after tax) earning, the evidence did not indicate the jury acted on an erroneous conception of the tax laws, and the evidence fully supported the verdict. The refusal to give an instruction on income taxes was not prejudicial and was harmless. Such application of the harmless error rule is common place and does not present any possibility, contrary to defendant's contentions, that any court will disregard or refuse to follow a decision of this Court. The *Flanigan* court did apply *Liepelt*. It merely found that reversal was not required.

Several other aspects of the procedural posture of the instant case deserve attention. In contrast to *Liepelt,* defendant made no attempt whatsoever to introduce any evidence pertaining to plaintiff's injuries, damages or wage loss. Plaintiff did not (again unlike the situation in *Liepelt)* present opinion evidence of the gross amount of wage loss through the testimony of an economist or actuary. Neither did defendant offer such evidence.

In further contrast with *Liepelt,* defendant in the instant case did not offer or request an instruction on income taxation prior to submission of the case to the jury. Under Missouri practice, instructions must be so offered in order for a party to complain on appeal of the trial court's refusal to give such an instruction. On its facts, this case merely involves the trial court's response to a communication received from a juror during the jury's deliberation.

Finally, defendant railroad has never contended on appeal that the damages awarded by the jury were excessive. It would appear that if defendant railroad genuinely thought itself prejudiced, it would have contended that the amount of the jury verdict was excessive, as it obviously was in *Liepelt.* The issue of instruction on income taxation, of course, has no bearing on liability. It relates solely to the issue of damages. In such circumstances, under Missouri law, since defendant has failed to raise excessiveness as a point on appeal, the prejudicial effect of the alleged error has not been properly preserved. *E.g., Myers* v. *Bi-State Development Agency,* 567 S.W.2d 638, 643 (Mo.banc 1978). This presents a sharp and vivid contrast when the instant case is compared with *Liepelt,* in which the damages were obviously and grossly excessive.

One other statement made by defendant requires clarification at the outset. In the beginning of its argument, defendant alleges that *Ingle* is in conflict with *Liepelt.* Such is emphatically not the case. *Liepelt* itself did not address the question of

whether it was to be applied to cases tried prior to the date of its decision but still pending on appeal at the time of the decision. Accordingly, it was perfectly proper for the Missouri Court of Appeals to address this issue, which was in effect reserved by *Liepelt,* by applying the existing law concerning such matters as enunciated by this Court. It is, in fact, extremely common for this Court to decide a substantive issue and then, at a later time, to determine whether that decision is to be given a retroactive effect to cases pending on appeal at the time of the decision. See, e.g., *Stovall* v. *Denno,* 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) *United States* v. *Wade,* 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), and *Gilbert* v. *State of California,* 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967) applicable only to pretrial identification confrontations taking place after date of decisions in *Wade* and *Gilbert); Johnson* v. *State of New Jersey,* 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966) *(Escobedo* v. *State of Illinois,* 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), and *Miranda* v. *State of Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), not applicable to cases tried before those decisions were announced); *Desist* v. *United States,* 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969) (decision in *Katz* v. *United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1968), applicable only to cases in which prosecution seeks to introduce evidence held illegal by *Katz* obtained after the date of the decision in *Katz); Fuller* v. *Alaska,* 392 U.S. 80, 89 S.Ct. 61, 21 L.Ed.2d 212 (1968) (decision in *Lee* v. *State of Florida,* 392 U.S. 378, 88 S.Ct. 2096, 20 L.Ed.2d 1116 (1968), construing Section 605 of the Federal Communications Act applicable only to cases where trial commenced after the date of decision in *Lee); Michigan* v. *Payne,* 412 U.S. 47, 93 S.Ct. 1966, 35 L.Ed. 736 (1973) (denying retroactive effect to *North Carolina* v. *Pearce,* 396 U.S. 711, 89 S.Ct. 2772, 23 L.Ed. 656 (1969));*Chevron Oil Company* v. *Huson,* 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) (denying retroactive effect to *Rodrique* v. *Aetna Casualty and Surety Company,* 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360

(1969)). It should be noted that the foregoing cases involve issues of civil nonconstitutional law as well as criminal constitutional issues. In fact, this Court has explicitly recognized that retroactive application may be denied to a case involving nonconstitutional noncriminal law. *Chevron Oil Company* v. *Huson,* 404 U.S. 97, 107, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971). For the foregoing reasons, any suggestion that *Ingle* is in conflict with *Liepelt* is completely erroneous.

It should also be noted that *Cazad* v. *Chesapeake and Ohio Railroad Company,* 622 F.2d 72 (4th Cir. 1980), *Seaboard Coast Line Railroad Company* v. *Yow,* 384 So.2d 13 (Ala. 1980) and *Oltersdorf* v. *Chesapeake and Ohio Railroad Company,* 83 Ill.App. 3d 395, 404 N.E.2d 320 (1980), cited by defendant in its Petition, cannot be regarded as authoritative cases on the questions presented herein. The issue of the retroactivity of *Liepelt* was not even discussed and apparently was not raised in any of these cases. Thus, contrary to defendant's contentions, these cases cannot be regarded as being in conflict with the instant case. See *Ramey* v. *Harber,* 589 F.2d 753, 760 n. 8 (4th Cir. 1978), *cert den.* 442 U.S. 910, 99 S.Ct. 2823 (1979).

II.

Under The Standards Of Non-Retroactivity Analysis, As Developed And Applied By This Court, The Court Below Properly Held *Liepelt* Non-Retroactive. The Well Reasoned Opinion Of The Court Below Does Not Warrant Further Review By This Court.

With the foregoing observations concerning the actual posture of the instant case in mind, respondent (hereinafter plaintiff) respectfully submits that the decision by the Missouri Court of Appeals, Eastern District, en banc, in the instant case is entirely proper, exhibits scrupulous fidelity to the decisions of this Court, and does not warrant review by this Court.

The Missouri Court of Appeals, in holding that *Liepelt* should not be retroactively applied in the instant case, relied upon the standards set forth in this Court's opinion in *Chevron Oil Company* v. *Huson,* 404 U.S. 97, 106-107, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971) wherein this Court held:

> "In our cases dealing with a nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see *e.g., Hanover Shoe, Inc.* v. *United Shoe Machinery Corp., supra,* 392 U.S. at 496, 88 S.Ct., at 2233, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., *Allen* v. *State Board of Elections, supra,* 393 U.S., at 572, 89 S.Ct. at 835. Second, it has been stressed that 'we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' *Linkletter* v. *Walker, supra,* 381 U.S., at 629, 85 S.Ct. at 1738. Finally, we have weighed the inequity imposed by retroactive application, for '(w)here a decision of this Court could produce substantial inequitable results applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.' *Cipriano* v. *City of Houma, supra,* 395 U.S. at 706, 89 S.Ct., at 1900." (404 U.S. 107, 92 S.Ct. 355)

Applying the foregoing test, there can be no doubt that the Rule announced by this court in *Liepelt* was, for purposes of nonretroactivity analysis, one of first impression, satisfying the threshold test set forth in *Chevron.* Mr. Justice Stevens explicitly gave recognition to this fact in his opinion in *Liepelt* as follows:

> "In cases arising under the Federal Employers' Liability Act, most trial judges refuse to allow the jury to receive evidence or instruction concerning the impact of federal income taxes on the amount of damages to be awarded." ____ U.S. ____ at 100 S.Ct. at 756.

Mr. Justice Stevens characterized the refusal to give such income tax instructions as "the prevailing practice". *Id.* see also ____ U.S. at ____, n. 6 and accompanying text, 100 S.Ct. at 757, n.6 and accompanying text. The fact that the federal circuits were split on the question does not detract from the conclusion that the rule announced in *Liepelt* was one of first impression in this Court. In *Michigan* v. *Payne,* 412 U.S. 47, 93 S.Ct. 1966, 35 L.Ed. 736 (1973), denying retroactive affect to *North Carolina* v. *Pearce,* 396 U.S. 711, 89 S.Ct. 2772, 23 L.Ed.2d 656 (1969), this Court stated:

> *"The result of Pearce was not 'foreshadowed' by any prior decision of this Court.* Indeed, prior to *Pearce,* resentencing judges were bound by no requirement that they articulate their reasons and generally enjoyed a wide discretion in terms of the factors they might legitimately consider. See *Williams* v. *New York,* 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). Nor could it be said that the Court's decision was clearly forecast by any trend of lower court decisions. *In Pearce itself the Court noted that lower federal and state courts were divided on all of the questions posed. 395 U.S., at 715 n. 5, 89 S.Ct., at 2075. Under these circumstances, judicial reliance on prior law was certainly justifiable".* (Emphasis added)

412 U.S. at 56, 93 S.Ct. at 1971. *See also Lemon* v. *Kurtzman* 411 U.S. 192, 199, 93 S.Ct. 1463, 1468, 36 L.Ed.2d 151 (1973).

The overwhelming weight of authority, prior to *Liepelt,* was that refusal to give a requested instruction on income taxation was not reversible error. *Boston & Me. R.R.* v. *Talber,* 360 F.2d 286 (1st Cir. 1966); *Varlack* v. *SWC Caribbean, Inc.,* 550 F.2d

171 (3rd Cir. 1977); *Gardner* v. *National Bulk Carriers, Inc.*, 221 F.Sup. 243 (E.D. Va. 1963); aff'd 333 F.2d 676 (4th Cir. 1964); *Johnson* v. *Penrod Drilling Co.*, 511 F.2d 234 (5th Cir banc), *cert den.* 423 U.S. 839 (1975); *Duncan* v. *St. Louis-San Francisco Railroad Co.*, 480 F.2d 79 (8th Cir.) *cert den.* 414 U.S. 859 (1973); *Scalise* v. *Central Railroad Company,* 129 N.J. Super 303, 323 A.2d 525 (1974); *Davis* v. *Fortino & Jackson Chevrolet Co.*, 510 P.2d 1376 (Colo.App. 1973); *Norfolk Southern Railway Co.* v. *Rayburn,* 213 Va. 812, 195 S.E.2d 860 (1973); *Raines* v. *New York Central Railroad Co.*, 51 Ill.2d 428, 283 N.E.2d 230, *cert den.* 409 U.S. 983, 93 S.Ct. 322 (1972); *Gorham* v. *Farmington Motor Inn, Inc.*, 159 Conn. 576, 271 A.2d 94 (1970); *Stallcup* v. *Taylor,* 62 Tenn.App. 407, 463 S.W.2d 416 (1970); *Henninger* v. *Southern Pacific Co.*, 250 Cal.App.2d 872, 59 Cal.Rptr. 76 (1967); *Kawaomoto* v. *Tasutake,* 49 Haw. 42, 410 P.2d 976 (1966); *Spencer* v. *Martin K. Eby Construction Company,* 186 Kan. 345, 350 P.2d 18 (1960); *Hardware Casualty Co.* v. *Harry Crown & Son, Inc.*, 6 Wis.2d 396, 94 N.W.2d 577, 581 (1959); *Bracy* v. *Great Northern Railway Co.*, 343 P.2d 848 (Mont. 1959), *cert den.*, 361 U.S. 949, 80 S.Ct. 403 (1960); *Louisville & Nashville Railroad Co.* v. *Mattingly,* 318 S.W.2d 844, 848 (Ky. 1958); *Briggs* v. *Chicago Great Western Railway Co.*, 248 Minn. 418, 80 N.W.2d 625 (1957); *Missouri-Kansas-Texas Railroad Co.* v. *McFerrin,* 156 Tex. 59, 291 S.W.2d 931 (1956); *Highshew* v. *Kushto,* 235 Ind. 505, 134 N.E.2d 555 (Ind. 1956); *Mitchell* v. *Emblade,* 80 Ariz. 398, 298 P.2d 1034 (1956); *Michaud* v. *Steckino,* 390 A.2d 524 (Me. 1978).

In light of the foregoing impressive array of authorities and the holding of the United States Supreme Court in *Michigan* v. *Payne,* 412 U.S. 47, 93 S.Ct. 1966, 35 L.Ed. 736 (1973) as quoted above, it is clear that the threshold test of *Chevron* has been met. Any contention to the contrary is specious. For this reason, *Crabtree* v. *St. Louis-San Francisco Railway Company,* ____ Ill. App. ____, 411 N.E.2d 19 (1980), cited by defendant in

its Petition, was wrongly decided, since that decision was based largely on the Illinois court's erroneous conclusion that *Liepelt* did not establish a new principle of law.

With respect to Missouri law, this Court is obviously aware of the opinion of the Missouri Supreme Court in *Dempsey* v. *Thompson,* 363 Mo. 339, 251 S.W.2d 42 (1952), which was cited by this Court in *Liepelt.* For that reason, it is appropriate to develop subsequent events in Missouri law which rendered the giving of an income tax instruction impermissible under Missouri law. In the mid 1960's, subsequent to the decision in *Dempsey,* the Missouri Supreme Court introduced a system of approved pattern jury instructions. Two particular portions of the Missouri Supreme Court Rules of Civil Procedure governing this matter should be emphasized. Rule 70.02 (b) provides as follows:

> "*(b) Missouri Approved Instructions Exclude Others.* Whenever Missouri Approved Instructions contains an instruction applicable in a particular case which the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other on the same subject."

Rule 70.02 (c) further provides:

> "(c) *Violation of Rule-Effect.* The giving of an instruction in violation of the provisions of this Rule shall constitute error, its prejudicial effect to be judicially determined. However, the use of an approved instruction or following notes on use before the effective date shall not be presumed to be error."

In construing Rule 70.02 (then 70.01) in *Brown* v. *St. Louis Public Service Company,* 421 S.W.2d 255, 259 (Mo.banc 1967), the court held that deviations from applicable Missouri Approved Instructions (hereinafter MAI) are presumed to be prejudicial error:

"unless it is made perfectly clear by the proponent of the instruction that no prejudice could have resulted from such deviation."

Accordingly, the Missouri Court of Appeals, in *Senter* v. *Ferguson,* 486 S.W.2d 644, 646-647 (Mo.App. 1972), forbade the giving of an income tax instruction, and in so doing held as follows:

"Respondent contends that this exact instruction was specifically approved and authorized in *Dempsey* v. *Thompson,* 363 Mo. 339, 251 S.W.2d 42, and referred to with approval in *Bowyer* v. *Te-Co. Inc.,* Mo., 310 S.W.2d 892. Both these cases, 1952 and 1958 respectively, were decided by the Supreme Court prior to the adoption of M.A.I. Since that time we are unaware of any cases where such an instruction was the basis for an appeal. This case, is, therefore, in a limited respect, one of first impression.

The question we must answer is whether, after the promulgation and adoption of M.A.I., it was error to give this additional instruction on the issue of damages.

Supreme Court Rule 70.01, V.A.M.R. states, 'Whenever M.A.I. contains an instruction applicable in a particular case which the appropriate party requests or the court decides to submit, such instruction shall be given *to the exclusion of any other on the same subject.'* (Emphasis ours). See also *Jurgeson* v. *Romine,* Mo.App., 422 S.W.2d 176.

In the instant case, in plain violation of this rule, two instructions on damages were given. While this was permissible before the introduction of M.A.I., it is now contrary to both the letter and spirit of the law. The court, in *Brown* v. *St. Louis Public Service Co.,* Mo., 421 S.W.2d 255, while not considering an 'income tax' instruction such as we have here, nevertheless used language which is appropriate

for this case. 'If counsel are permitted to "improve" the approved instructions, *even within the confines of specific precedents,* the value of these instructions will be lost.' (Emphasis ours). l.c. 258.

The *Brown* case held that a deviation from an M.A.I. instruction which does not need modification under the facts in the case establishes a presumption of prejudicial error. Likewise, in *Houston* v. *Northup,* Mo., 460 S.W.2d 572, the court was called upon to decide whether the giving of an additional instruction by the trial judge constituted error, in a situation where the jury requested clarification of the M.A.I. instructions given to them. The court stated at pp. 575-576, 'Implicit in a scheme of approved pattern instructions such as M.A.I. is the central idea that such instructions do not require further clarification or amplification. They submit ultimate issues and do so adequately. Consequently, we have held in cases such as *Brown* v. *St. Louis Public Service Co.,* Mo., 421 S.W.2d 255, and *Murphy* v. *Land,* Mo., 420 S.W.2d 505, that change in the prescribed language other than the authorized modifications is not permissible and constitutes error. *Necessarily, it also follows that it is not permissible to modify or enlarge or change or explain M.A.I. instructions by separate instructions not provided for or authorized in M.A.I. To permit modification, clarifications would be just as objectionable as doing so within the body of the prescribed instructions.* * * * M.A.I. makes no provision for, and does not authorize or contemplate that trial judges will devise additional instructions seeking to explain or amplify instructions which conform to M.A.I. (Emphasis ours).

The instruction which referred to taxes in the case at bar was clearly an addition to or 'modification' of M.A.I. 4.01 which was not called for by the issues in the case, and which has been specifically prohibited by our Supreme

> Court. ... *We must accordingly rule that the giving of this instruction established a presumption of prejudicial error which may have tended to influence the amount of the verdict. Thomas* v. *supra."* (Emphasis added except as otherwise indicated).

Additionally, in *Houston* v. *Northup,* 460 S.W.2d 572 (Mo.banc 1970), the Missouri Supreme Court, en banc, explicitly prohibited the giving of supplemental instructions to the jury in response to inquiries during jury deliberations. The court there held that the proper response to such an inquiry during deliberations is to advise the jury that the instructions previously given were proper. Such of course is exactly what the honorable trial court did in the instant case. Had the trial court undertaken to give any supplemental instruction, under M.A.I. and the then applicable law, it was virtually certain that any verdict returned would have been reversed on appeal. In this regard, the trial court cannot be convicted or error for complying with M.A.I. and for not anticipating *Liepelt,* which was not to be decided until some two and one half years later.

Application of the second portion of the *Chevron* test requires a court to

> "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 404 U.S. 107, 92 S.Ct. at 355.

In *Ramey* v. *Harber,* 589 F.2d 753, 758-759 (4th Cir. 1978), *cert den.* 442 U.S. 910, 99 S.Ct. 2823 (1979), the Fourth Circuit described this portion of the *Chevron* test as follows:

> "In civil cases, which present different considerations from those in criminal cases, the courts have often focused on such factors as reliance and the need for stability. We think this is the teaching of *Lemon* v. *Kurtzman,* 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973), the most recent expression of the Supreme Court on the question.

> We are faced then with a situation where we must use the balancing process to determine whether the benefits to be gained by applying *Eirod* retroactively to this case are outweighed by considerations of reliance, hardship, injustice and the impact on the administration of justice in the Fourth Circuit."

In *Lemon* v. *Kurtzman,* 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973), Mr. Chief Justice Burger, writing for the Court, emphasized the extreme importance attached to the interests of those who have relied upon prior law and repudiated the harsh notion that a law later overturned should be treated as if it never were the law. In this regard, Mr. Chief Justice Burger stated for the Court:

> "However appealing the logic of *Norton* may have been in the abstract, its abandonment reflected our recognition that *statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of nonretroactivity.* Appellants offer no persuasive reason for confining the modern approach to those constitutional cases involving criminal procedure or municipal bonds, and we ourselves perceive none." 411 U.S. at 199, 93 S.Ct. at 1468. (Emphasis supplied).

In the instant case, reliance on prior law is a critical factor. Apart from the fact that defendant offered no income tax instruction before the case was submitted to the jury, as demonstrated above, under M.A.I., the refusal of an income tax instruction was not merely a matter of reliance on existing law but was one of judicial compulsion by existing law. As observed by the Missouri Court of Appeals in the instant case, the Missouri Appellate Courts "forbade" such an instruction. 603 S.W.2d at 34. Consideration of the reliance aspect therefore clearly points towards prospectivity. See also *Keltner* v. *Keltner,*

589 S.W.2d 235, 239-240 (Mo.banc 1979); *Kacher* v. *Pittsburg National Bank,* 545 F.2d 842, 845-846 (3rd Cir. 1976).

Further, when the purpose of the rule announced in *Liepelt* is measured against the facts of the instant case, the conclusion is quite inescapable that refusal to apply *Liepelt* retroactively in the instant case can in no manner be said to retard the operation of the rule in *Liepelt*. The Missouri Court of Appeals in the instant case properly characterized the primary purpose of *Liepelt* as "the Court's desire to prevent the rendering of an excessive verdict founded upon improper considerations". 603 S.W.2d at 34. This purpose was clearly expressed by Mr. Justice Stevens in his opinion for the court in *Liepelt,* wherein he stated that the giving of an income tax instruction:

> "would merely eliminate an area of doubt or speculation which might have an improper impact on the computation of the amount of damages." ____ U.S. at ____, 100 S.Ct. at 760.

This Court in *Liepelt* was obviously motivated by the extreme excessiveness of the damages awarded in that case. The excessiveness of the award was repeatedly emphasized by the Court in contrasting the computations of plaintiff's expert witness to the damages awarded which exceeded the expert's computations by two and one half times. 100 S.Ct. 756, 757, 759. The Court's motivation is well summarized in the following statement:

> "In this case the respondent's expert witness computed the amount of pecuniary loss at $302,000, plus the value of the care and training that decedent would have provided to his young children; the jury awarded damages of $775,000. It is surely not fanciful to suppose that the jury erroneously believed that a large portion of the award would be payable to the Federal Government in taxes and that therefore it improperly inflated the recovery."

100 S.Ct. 755, 759. The circumstances were further aggravated by the trial court permitting plaintiff to present expert testimony concerning gross future wage loss, while depriving defendant of the opportunity to cross examine and present its own expert's computations of after-tax future wage loss.

By requiring an income tax instruction upon the request of the defendant, the Court in effect created a prophylactic rule, directed to insuring that improper matters are not taken into consideration by the jury in computing damages and therefore providing additional assurance against an excessive verdict. In that respect, the Court's attention is invited to the striking parallel between the purpose of the rule in *Liepelt* and the purpose of the rule announced in *North Carolina* v. *Pearce,* 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). *Pearce* established safeguards to prevent the possibility of consideration of improper factors in resentencings of criminal defendants upon conviction on retrial following reversal of original convictions. *Michigan* v. *Payne,* 412 U.S. 47, 93 S.Ct. 1966, 36 L.Ed. 736 (1973), denied retroactive effect to *Pearce* with respect to rsentencings which occurred prior to the date of the decision in *Pearce,* thereby denying retroactive application to cases pending on direct review in which the resentencing took place prior to *Pearce.*

Pearce involved contentions that the trial court considered an improper factor, vindictiveness toward or punishment of a defendant for exercising the right to appeal, on resentencing after a conviction in a retrial held following a successful appeal from initial conviction. Established principles of due process prohibit considerations of such factors, and *Pearce* held that when a judge decrees a more severe sentence after retrial, he must articulate his reasons therefor and those reasons must relate to objective matters arising since the date of original sentencing. *Pearce,* therefore, created a prophylactic rule designed to insure against trial judge vindictiveness on resentencing.

Comparing *Liepelt* with *Pearce,* the relevant similarities are immediately apparent. Just as in *Pearce,* it was clear before *Liepelt,* that income taxation was not a proper matter for juries to consider in assessing damages. As in *Pearce, Liepelt* created what is, in effect, a prophylactic rule designed to insure that the matter of income taxation is not improperly considered by the jury.

With the foregoing in mind, the court's attention is invited to the analysis in *Payne* pertaining to the purpose of the rule in *Pearce* and the effect of that purpose in nonretroactivity analysis:

> "The first-articulated purpose of the *Pearce* rules — to protect against the possibility that actual vindictiveness will infect a resentencing proceeding — deserves closer scrutiny. Unlike the purposes underlying many of the decisions heretofore accorded retrospective application, this purpose does not implicate the ' "fair determination" of . . . *guilt or innocence.' Roberts* v. *Russell,* 392 U.S. 293, 294, 88 S.Ct. 1921, 1922, 20 L.Ed.2d 1100 (1968) (emphasis supplied). It does, however, involve questions touching on the 'integrity' of one aspect of the judicial process. *McConnell* v. *Rhay,* 393 U.S. 2, 3, 89 S.Ct. 32, 33, 21 L.Ed.2d 2 (1968). The *Pearce* restrictions serve to ensure that resentencing decisions will not be based on improper considerations, such as a judge's unarticulated resentment at having been reversed on appeal, or his subjective institutional interest in discouraging meritless appeals. By eliminating the possibility that these factors might occasion enhanced sentences, the *Pearce* prophylactic rules assist in guaranteeing the propriety of the sentencing phase of the criminal process. In this protective role, *Pearce* is analogous to *Miranda* v. *Arizon,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), in which the Court established rules to govern police practices during custodial interrogations in order to safeguard the rights of the

accused and to assure the reliability of statements made during those interrogations. Thus, the prophylactic rules in *Pearce* and *Miranda* are similar in that each was designed to preserve the integrity of a phase of the criminal process. Because of this similarity, we find that *Johnson* v. *New Jersey,* 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966), which held *Miranda* nonretroactive, provides considerable guidance here. See also *Jenkins* v. *Delaware,* 395 U.S. 213, 89 S.Ct. 1677, 23 L.Ed.2d 253 (1969).

It is an inherent attribute of prophylactic constitutional rules, such as those established in *Miranda* and *Pearce,* that their retrospective application will occasion windfall benefits for some defendants who have suffered no constitutional deprivation. *Miranda's* well-known warning requirements provided a protection 'against the possibility of unreliable statements in *every* instance of in-custody interrogation,' and thereby covered many 'situations in which the danger [was] not necessarily as great as when the accused is subjected to overt and obvious coercion.' *Johnson* v. *New Jersey, supra,* 384 U.S., at 730, 86 S.Ct. at 1779 (emphasis supplied). Thus, had *Miranda* been applied retroactively, it would have required the reversal of many convictions in which no serious constitutional violation had occurred. *Id.,* at 731, 86 S.Ct. at 1779. Likewise, the retroactive application of *Pearce* would require the repudiation of many sentences rendered under circumstances in which there was no genuine possibility that vindictiveness played a role. Judicial impropriety in the resentencing process, albeit intolerable wherever it happens, surely is not a common practice. Indeed, nothing in *Pearce* intimates that the Court regarded it as anything more than an infrequently appearing blemish on the sentencing process. *Absent countervailing considerations rooted in the purposes underlying a new rule, this factor — that retroactive application of such broadly protective*

rules would occasion reversals in many instances in which no actual prejudice has been suffered — points toward a ruling of prospectivity."

412 U.S. at 52-54, 93 S.Ct. 1969-70 (Emphasis supplied).

As the foregoing illustrates, the question of prejudice to the defendant is one which must be considered in the balancing test required by *Chevron*. When the matter in issue goes only to the issue of damages, it is inevitable that in order to determine whether prejudice has occurred one must consider whether the damages awarded were excessive. In the instant case, as noted by the court below, defendant has not contended on appeal that the damages were excessive. A review of plaintiff's injuries, which are set out fully below, demonstrates that the verdict was reasonable and more than amply supported by the evidence. In fact, the verdict returned by the jury was $125,000.00 less than the amount requested by plaintiff in final argument (T. 755). For these reasons, as observed by the court below, it is difficult to imagine how defendant was prejudiced in the instant case. Under such circumstances, automatic, indiscriminate retroactive application of *Liepelt* to each and every case tried prior to the date of its decision but still pending on appeal at the time of the decision would, as in *Michigan* v. *Payne,* require reversals in many instances in which no actual prejudice has been suffered. Therefore, under the law as announced by this Court, such a finding points toward a ruling of prospectivity. Further, and contrary to the implications of defendant's Petition for Writ of Certiorari, consideration of whether actual prejudice has been suffered does not constitute an "escape" from *Liepelt* but rather a proper application of the rules announced by this Court for evaluating the prospectivity question.

An examination of the history of income tax instruction also points to a ruling of prospectivity. As noted by the court below, the three cases cited and relied upon by this court in *Liepelt, Dempsey* v. *Thompson,* 251 S.W.2d 42 (Mo. 1952),

Domeracki v. *Humble Oil and Refining Company,* 443 F.2d 1245 (3rd Cir. 1971) and *Burlington Northern, Inc.* v. *Boxburger,* 529 F.2d 284 (9th Cir. 1975), all mandated the giving of such income tax instructions prospectively only. Thus, the history of the rule, as set forth in the foregoing cases, clearly indicates that prospective application has not been held to retard the operation of the rule.

Lang v. *Texas & Pacific Railway Company,* 624 F.2d 1275 (5th Cir. 1980), cited by defendant, cannot be regarded as persuasive or authoritative. *Lang* does not even attempt to apply the foregoing balancing test, required by *Chevron,* and gives absolutely no consideration to the reliance factor

Discussion of the balancing test obviously shades into the final factor of the *Chevron* test, that is the inequity and hardship which will be suffered by plaintiff as a result of any reversal in the instant case.

Again, a key factor is the question of reliance. Apart from the fact that defendant offered no income tax instruction before the case was submitted to the jury, as fully demonstrated above, the supplemental instruction requested by defendant was clearly prohibited under M.A.I. As also demonstrated above, compliance with the provisions of M.A.I. is mandatory. The Missouri Courts have recognized that it is extremely harsh and unjust, and constitutes a penalty, to reverse a judgment in a case in which instructions were given in accordance with M.A.I., even if subsequent developments mandated changes in the instruction. In *Smile* v. *Lawson,* 506 S.W.2d 400, 402 (Mo. 1974), the Missouri Supreme Court stated:

> "The trial court having given an approved instruction the use of which at the time was mandatory may not be convicted of error in not anticipating future changes in instructions on the subject."

To reverse the judgment in the instant case, and compel plaintiff to suffer the expense, hardship and injustice of a retrial because the trial court complied with the then mandatory provisions of Missouri law which did not permit a reply to the juror's communication, would be extremely harsh. Such a result could cause a windfall benefit to this defendant, who, as demonstrated above, has suffered no prejudice. Plaintiff suffered his severe and debilitating injuries more than seven years ago. He has yet to receive a penny of the compensation properly due him due to the indisputably demonstrated negligence of the defendant. Reversal and retrial of this case would inevitably involve additional burdensome expense and undoubtedly would also involve further years of delay during retrial and subsequent appeals. In this regard, it should be noted that damages were never seriously contested by defendant during the trial of the case. In essence, plaintiff, who has been severely disabled through no fault of his own, would be penalized for the trial court's compliance with the mandatory rules in effect at the time of trial, a matter in which he had no real choice. Obviously, reversal under these circumstances, would be grossly inequitable and harsh.

Taking all the relevant factors into consideration-that defendant made no attempt whatsoever to introduce any evidence pertaining to plaintiff's injuries, damages or wage loss; that there was no issue in the trial and no acturarial testimony presented by either party pertaining to wage loss calculations; that the defendant-railroad did not even offer an instruction on income taxation prior to submission of the case to the jury; that, in any event, Missouri appellate courts forbade the giving of an income tax instruction; that the record in the instant case, on its facts, presents only the limited inquiry of whether the trial court properly responded to a communication received from a juror during the jury's deliberations; that the damages were not really contested by defendant in the trial; that the amount of the verdict was clearly not excessive, was fully supported by the evidence, and the defendant-railroad did not even raise the issue

of the excessiveness of the verdict as a point on appeal; and that the history of the rule announced in *Liepelt* points toward a holding of prospectivity—it is evident that the hardship and injustice of applying *Liepelt* retroactively to the instant case far outweighs the benefits to be gained by such retroactive application.

In order to place the matter in perspective, plaintiff's injuries can be summarized as follows. All of the evidence presented in the trial, with respect to injuries and damage, was presented by plaintiff. That evidence was entirely undisputed. The jury had the benefit of the testimony of four physicians, including a neurosurgeon, a neurologist and orthopedic surgeon (T. 322-333, 346-417, 420-490, 490-520), and numerous hospital and medical exhibits (Plff's. Exs. 10, 15, 16, 17, 18). Plaintiff was initially hospitalized for a full spine myelogram which revealed defects in the cervical and lumbar spine (Plff's. Ex. 15; T. 343, 344, 357, 358). He was rehospitalized shortly thereafter for surgery involving a hemilaminectomy, exploration and decompression at C-5, C-6 (Plff's. Ex. 16; T. 367-374, 412, 413). Thereafter, he was hospitalized on a third occasion for a hemilaminectomy at L4-L5 (Plff's. Ex. 17; T. 380-383). His fourth hospitalization for an additional myelogram revealed a central filling defect at L4-L5 (Plff's. Ex. 18; T. 391-393). Plaintiff has experienced nothing except steady downhill progression (T. 399, 400). His injuries can be summarized as follows: Ruptures of the discs of the cervical and lumbar spine (T. 367-374, 380-383, 391, 392, 412, 413); massive damage to all of the nerve roots and nerves in the neck, shoulder blade and under the clavicle supplying the right upper extremity, including C-4, C-5, C-6, C-7, C-8 and T-1 (T. 457, 458, 508); severe damage to all of the muscles of the right upper extremity resulting from the damage to the cervical nerve roots and nerves supplying those muscles; almost total atrophy, withering, weakness, wasting, deterioration and loss of reflexes, motor function, and use of the entire right upper extremity, including the shoulder, back, arm, hand and supporting muscles and tissue (T. 428, 433, 448, 449, 450,

454, 455-459, 498, 499, 503, 506, 508); severe damage to the nerves and muscles of the low back and lumbar spine; constant pain in the right leg, weakness, loss of relexes and atrophy; additional defects and bulging of the discs in the lumbar spine (T. 391, 392, 448, 449, 451, 452, 456, 466, 489, 490, 503, 505, 506, 518). He suffers from constant severe and excrutiating pain, requiring the utilization of a subcutaneous nerve stimulator, which is affixed to his body, and constant use of Percodan, a narcotic synthetic codeine pain medication (T. 286, 287, 390, 391, 395, 397-400, 450). The pain is unbearable and prevents him from sleeping (T. 287). It runs from the top of his shoulder blades, all the way down between his shoulders, into his arm and his right hand feels as if it is in a bucket of fire (T. 288). The pain also extends from his low back into his right leg and foot (T. 287, 288). The fingers of his right hand often lock in a closed position or fist and he is required to physically pull the fingers open with his other hand (T. 279). He is unable to lift his arm and has almost no hand grasp; his grip was described as feeble (T. 450, 454, 503). He has almost total atrophy of the right upper extremity, absent bicep and tricep jerks, almost completely flaccid muscles (T. 498). He is permanently disabled from any sort of work and will never regain ability to perform any work again (T. 498, 499). There is no way on earth that he is going to return to any sort of normal functioning life again (T. 506). His injuries are permanent, his future is dismal, with a continuing downhill course (T. 398-400, 466, 467, 508, 511). His condition is perhaps best described by his treating neurosurgeon who stated (T. 398):

> "... I really feel sorry for the man, because he is sort of stuck with the situation he is in right now, and there isn't a great deal that I have to offer further to assist him to any more of a continuing downhill course."

Plaintiff was 44 years of age at the time of his injury and 49 years of age at the time of trial (T. 211). He would have in all probability continued his railroad employment until age 65, but for his injuries.

Under the circumstances, as set forth above, reversal of the judgment in the instant case would clearly be a distortion and a mockery of justice. It would impose a harsh and unjust burden on plaintiff as a result of a matter which had absolutely no impact on the judgment in this case.

CONCLUSION

For all of the foregoing reasons, plaintiff (respondent) respectfully submits that the judgment of the Missouri Court of Appeals, Eastern District, en banc, below, is entirely correct and in accordance with the previous decisions of this Court and that the same does not warrant review by this Court. For that reason, it is further respectfully submitted and urged that the Petition for Writ of Certiorari in the instant case should be denied.

Respectfully submitted,

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